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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION	**No. M:06-cv-01791-VRW** **PLAINTIFFS' [PROPOSED] SUPPLEMENTAL COMPLAINT**

This Document Relates Only to:
Center for Constitutional Rights v. Bush, Case No. 07-1115

JURISDICTION AND VENUE

1. This action arises under the United States Constitution, 50 U.S.C. 1801 et. Seq..

The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361.

Dockets.Justia.com

INTRODUCTION

2. This supplemental complaint sets forth several developments subsequent to the filing of the initial complaint in this case. In particular, plaintiffs seek to file this supplemental complaint now in order to challenge the constitutionality of new legislation authorizing electronic surveillance of their attorney-client communications with overseas clients and witnesses. Plaintiffs maintain that the statute is unconstitutional as applied to their conversations under the First and Fourth Amendments, and seek injunctive relief to protect their ability to consult their clients with assurances of confidentiality essential to their communications.

3. On August 5, 2007, Defendant President Bush signed into law the Protect America Act of 2007, which amended the Foreign Intelligence Surveillance Act (FISA). The amendments substantially expand the government's ability to conduct warrantless surveillance of U.S. citizens' phone conversations with persons overseas, without probable cause of any criminal activity.

4. Plaintiffs therefore seek additional injunctive and declaratory relief, finding the Protect America Act in violation of their First and Fourth Amendment rights

FACTS

NEW STATUTORY SCHEME

5. On August 5, 2007, the President signed into law the Protect America Act of 2007. Pub. L. No. 110-055, 121 Stat. 522. The Act amends FISA, and substantially expands the statutory authority of the government to wiretap communications without warrants or any similar meaningful judicial oversight, and without probable cause of criminal activity.

6. Under the new law, the Attorney General and the Director of National Intelligence have the authority to establish procedures and to authorize, for periods up to one

year and without judicial oversight, "the acquisition of foreign intelligence information concerning people reasonably believed to be outside the United States." 50 U.S.C. §§ 1805A, 1805B. The term "foreign intelligence information" was previously defined by FISA, and includes "information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to[,] the national defense or the security of the United States; or [] the conduct of the foreign affairs of the United States." 50 U.S.C. § 1801(e).

7. To authorize such acquisition, the DNI and AG must "determine" that the surveillance is "directed at a person reasonably believed to be outside the United States" (or otherwise does not constitute "electronic surveillance" under FISA) and that "a significant purpose of the acquisition is to obtain foreign intelligence information." The DNI and the AG must also establish what they "determine" to be "reasonable procedures" to ensure that such acquisition "concerns persons reasonably believed to be located outside the United States." 50 U.S.C. §§ 1805B(a), 1805A. This "determination" is to be reduced to a written certification, supported by affidavit of "appropriate officials in the national security field," but is "not required to identify any specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed." 50 U.S.C. § 1805B(a),(b). The DNI and the AG need not find probable cause that the target of the surveillance is a "foreign agent" as defined in FISA or is involved in any criminal activities whatsoever. A copy of this certification is then transmitted to the FISA court, where it is to remain sealed, hidden away from judicial review, unless the certification is "necessary to determine the legality of the acquisition." 50 U.S.C. § 1805B(c).

8. The Act remains in effect for only 180 days from the date of passage. The AG has up to 120 days after the effective date of the act to submit the procedures established under 105B

to the Foreign Intelligence Surveillance Court (FISC). The FISC shall then review them to assess whether the AG and DNI's determination that those procedures are "reasonably designed" to avoid acquisitions constituting electronic surveillance is "clearly erroneous." *Id.* § 1805C(b). As a practical matter, no meaningful judicial review of the "reasonable procedures" exists. Even if the FISC were to act promptly and reject the government's procedures, the government has another 30 days to respond with new procedures.

9. As noted in paragraph 6, the surveillance may be authorized for up to one year. Any authorizations in effect at the time the law expires in 180 days will not be affected by the termination of the law. Pub. L. No. 110-055, 121 Stat. 522, Section 6(d)**.** This allows the government to engage in warrantless surveillance under the law not only for the 180 days that it is in effect, but for another year for authorizations put in place shortly before the Act is about to expire.

10. Thus, the content of private communications of people within the U.S. may be monitored without a warrant, so long as that person in the U.S. is not the target (even if the target outside the U.S. is a U.S. citizen). Warrantless surveillance is authorized without any showing of probable cause of illegal activity or that the target is an agent of a foreign power. No procedures exist to safeguard confidential attorney-client communications, nor any other privileged communications. (While minimization procedures are alluded to, *see* 50 U.S.C. § 1805B(5), there is no requirement that such procedures be judicially supervised, and the adequacy of the minimization procedures is outside the purview of the limited judicial review provided for by § 1805C(b).)

EFFECT OF NEW STATUTORY SCHEME ON PLAINTIFFS

11. Plaintiffs' professional obligations require them to engage in telephonic and email communications with individuals outside the U.S., including attorneys who are U.S. citizens. Plaintiffs have a reasonable expectation of privacy in such conversations.

12. The newly enacted statutory scheme permits Defendants to conduct electronic surveillance of plaintiffs' attorney-client conversations without a showing of probable cause that plaintiffs or their clients are engaged in criminal activity, without a warrant, and without any meaningful judicial oversight..

13. The new law directly interferes with plaintiffs' ability to carry out their professional ethical duties of confidentiality and advocacy for their clients.

CLAIMS FOR RELIEF

FIFTH CLAIM FOR RELIEF
(Fourth Amendment violations)

13. Plaintiffs incorporate each and every allegation contained in the preceding paragraphs and in the original Complaint as if set forth fully herein.

14. The Protect America Act of 2007 violates the Fourth Amendment by authorizing Defendants to carry out unreasonable surveillance of Plaintiffs' private telephone and email communications with their clients and witnesses without probable cause or a warrant.

SIXTH CLAIM FOR RELIEF
(First Amendment Violations)

15. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs and the original Complaint as if set forth fully herein.

16. The Protect America Act of 2007 violates the First Amendment by authorizing Defendants to carry out warrantless surveillance of Plaintiff's attorney-client communications,

thereby impairing Plaintiffs' ability to freely provide legal advice, to join together in an association for the purpose of legal advocacy, to freely form attorney-client relationships, to vigorously advocate for clients and to petition the government for redress of grievances all of which are modes of expression and association protected under the First Amendment to the United States Constitution.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

(a.) Declare the newly enacted amendments to the FISA that allow Defendants to engage in warrantless surveillance without probable cause unconstitutional as applied to Plaintiffs' attorney-client and professional communications, and enjoin any further such warrantless surveillance;

(b.) Order that all Defendants turn over to Plaintiffs all information and records in their possession relating to Plaintiffs that were acquired through warrantless surveillance or were the fruit of any warrantless surveillance, and subsequently destroy any such information and records in Defendants' possession;

(c.) Award costs, including an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A);

(d.) Award such other relief as the Court may deem just and proper.

Respectfully submitted,

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